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CASE COMMENTARY

BOA v WADA: Harmonisation v Self-Regulation

Gregory Ioannidis[*]

INTRODUCTION

The area of anti-doping in sport has always been fascinating, exciting, as well as complicated and controversial. The two latter aspects have been entrenched, in case law and statutory law and the highest Court in sport, namely the Court of Arbitration for Sport (CAS), in Lausanne, Switzerland. This court has had the opportunity to develop important principles of sports law. One of these principles is the subject matter of the present case commentary and relates to the principle of self-regulation. In other words, it examines the ability of sporting governing bodies to regulate their sport and concentrates on the legality of such self-regulation. In doing so, this case commentary will also examine the particular importance sports law jurisprudence attaches on the contractual relationship between sporting governing bodies and athletes. Such analysis should help readers understand the nature of regulation in sport, as well as the reasoning behind the decision of the Court of Arbitration for Sport in the case under analysis.

THE FACTUAL BACKGROUND

The Appellant in the present Appeal was the British Olympic Association (BOA), which is the national Olympic association, responsible for all UK Olympic teams. The BOA is a company incorporated under the laws of England.

The Respondent is the World Anti-Doping Agency (WADA), a Swiss private law foundation, whose headquarters are in Montreal, Canada, but whose seat is in Lausanne, Switzerland.

[*] LLB (Hons), LLM (Sports Law), PhD (Sports Law), Master of the Moots, Negotiation Co-ordinator, Faculty Advisor for the Bar of England and Wales, Advocate, Senior Lecturer in Law, Barrister (Middle Temple), University of Buckingham.

The present commentary relates to an Appeal brought forward by the BOA against a decision reached by WADA, to hold BOA's bylaw of its Rule 7.4 invalid. Such bylaw does not allow for membership or selection of athletes who have, previously, served an anti-doping ban. The *Anti-Doping bylaw* states:

> "Any Person who is found to have committed an Anti-Doping Rule violation will be ineligible for membership or selection to the Great Britain Olympic Team or to receive funding from or to hold any position with the BOA as determined by the Executive Board in accordance with the BOA's bylaw on Eligibility for future membership of the Great Britain Olympic Team."

The new version of the above bylaw was ratified by the BOA in 2009 and WADA informed the BOA, in November 2011 that such bylaw was not in compliance with the WADA Code. In particular, WADA wrote to BOA on 21 November 2011 stating:

> "…that the British Olympic Association has been determined to be non-compliant with the (WADA) Code because your rule on selection for the Olympic Games is an extra sanction, and non-compliant for the same reason the IOC eligibility rule was deemed non-compliant by the Court of Arbitration for Sport."

This determination constituted the 'decision' against which the BOA appealed to the CAS.

The above determination by WADA, came as a result of another CAS Award in the case of *US Olympic Committee v International Olympic Committee*,[1] (the USOC Award), on 4 October 2011. In this case, the USOC challenged the validity of an IOC rule [IOC Regulation] which stated:

> "Any person who has been sanctioned with a suspension of more than six months by any anti-doping organisation for any violation of any anti-doping regulations may not participate…in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension."

The BOA did not share WADA's view and attempted to distinguish the *USOC* Award from the present Appeal. In various pieces of correspondence prior to the Appeal, the BOA stated that its bylaw made reference to a

[1] *US Olympic Committee v International Olympic Committee* CAS 2011/O/2422.

selection policy and it was neither a rule of ineligibility nor a sanction and, consequently, did not violate the WADA Code.

As stated previously, WADA informed the BOA, on 21 November 2011 that its bylaw was not in compliance with the WADA Code and on 12 December 2011, the BOA filed an Appeal with the CAS, pursuant to Article 47 of the CAS Code of Procedure. The BOA requested CAS to:

1) annul the WADA decision,
2) rule that the bylaw is a selection rule and not a sanction rule and
3) rule that the bylaw is in compliance with the WADA Code.

The BOA was represented by Baker & McKenzie LLP who instructed Lord Pannick QC and Adam Lewis QC of Blackstone Chambers, whereas WADA was represented by Bird & Bird LLP and Carrard & Associés.

The CAS Panel of judges, who heard the matter, comprised of Richard McLaren (Barrister in Canada), Michele Bernasconi (Attorney in Switzerland) and David Rivkin (Attorney in USA).

THE PARTIES' MERITS AND THEIR SUBMISSIONS

The BOA, in an attempt to persuade the Panel, produced several submissions regarding the interpretation of WADA Code, the interpretation of its own bylaw under appeal, as well as a distinction between the BOA and other sporting governing bodies, such as the International Olympic Committee, in terms of creating rules and regulations. In summary, the BOA's submissions could be summarised as follows:[2]

I. Construing the WADA Code to ascertain precisely what constraints it imposes on the actions and policies of the signatories;
II. Assessing the true purpose, nature and effect of the bylaw to ascertain whether it is caught by those constraints; and
III. Comparing the bylaw to the IOC Regulation considered by CAS in the USOC Award.

The BOA's submissions, therefore, focused on the notion of the 'proper' construction and interpretation of the bylaw and the WADA Code. The primary submission stated that the bylaw is not a sanction rule, but instead, a rule which relates to selection of athletes solely. In order to support this contention, the BOA attempted to distinguish itself from the IOC and further stated that the WADA Code says nothing to indicate that an autonomous body

[2] Para 5.2 of the Award.

such as the BOA cannot establish rules that prohibit the selection of athletes. On a proper construction, the BOA argued, its bylaw is different in nature from the original disciplinary sanction imposed as a consequence of the anti-doping offence.[3]

WADA's submissions, on the other hand, sought the assistance of a previous CAS Award in *USOC v IOC*,[4] [the well-known Award in favour of LaShawn Merritt]. In particular, WADA argued that the application of the BOA's bylaw on athletes is an additional sanction to a previous offence committed, as it is clear that such bylaw precludes athletes from participating in the Olympics. WADA also submitted that the BOA's contentions that its bylaw is fair, necessary and appropriate cannot possibly be the subject matter of the present appeal. The real issue is whether the bylaw can be properly characterised as an additional sanction. If this is the conclusion of the Court, then such bylaw cannot be in compliance with the WADA Code and, therefore, infringes Article 23.2.2 of the Code.[5]

THE PANEL'S DECISION

The Panel was cautious to acknowledge[6] that "both Parties are strong advocates in the fight against doping" and that "BOA and WADA both recognise that doping is fundamentally contrary to the spirit of sport." The Panel summarised the main issue under consideration at Paragraph 8.2 of its Award and stated: "The dispute between the Parties here involves one means of pursuing the fight against doping, not the fight itself. The bylaw prevents an athlete who has had a doping offence from being selected to represent the British Olympic Team. The core issue to be determined here is whether BOA may pursue that policy on its own or whether that policy must be pursued, if it all, through the world-harmonised WADA Code."

The Panel's reasoning is explicit in terms of the BOA's acceptance of the WADA Code, as the BOA is one of its signatories. The Panel states at paragraph 8.12 of its Award that the BOA has agreed to limit its autonomy by signing the Code and, therefore, accepting its terms. The Panel makes the important point that the purpose of WADA's existence is to harmonise different anti-doping rules and sanctions throughout the world.[7] If the BOA

[3] Para 5.2 – 5.19 of the Award.
[4] *USOC v IOC* CAS 2011/O/2422.
[5] Paras 5.36 – 5.68 of the Award.
[6] Para 8.1 of the Award.
[7] The Panel states at para 8.12: *"*However, NOC's like BOA have agreed to limit their autonomy by accepting the WADA Code. In particular, Article 23.2.2 WADA Code, requires that its Signatories, including NOC's do not make any additional provisions in their rules which would change the substantive effect to any enumerated provisions

was allowed to operate independently and separately from WADA, in terms of sanctions, such harmonisation (and the fight against doping) would assume the risk of being seriously undermined.

The Panel came to the conclusion that the effect of the bylaw is to make an athlete 'ineligible' for participation in the Olympics.[8] It is submitted that such interpretation is correct and confirms the argument that the two issues in relation to the application of the BOA's bylaw concern the 'eligibility' and 'participation' of athletes in sporting competitions. The Panel, similarly, had no difficulty in finding that the BOA's bylaw "renders an athlete ineligible to compete - a sanction like those provided for under the WADA Code."[9]. Accordingly, the Panel concluded that the BOA's bylaw has the effect of a disciplinary sanction and it is, therefore, incompatible with the WADA Code.

HARMONISATION V SELF-REGULATION

It could be argued that such decision was to be expected, given that CAS had already ruled on a similar matter only recently.[10] Although the BOA attempted to distinguish the two cases, the truth is that rules that 'prohibit' athletes from taking part in the Olympics are disciplinary in nature and, therefore, constitute a sanction.

In the present matter, the application of the BOA's bylaw has as an aim to punish athletes, for the same offence, twice. With respect, the argument that the bylaw has a different nature, in a sense that it only prohibits selection, is

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of the WADA Code, including its sanctions for doping. The purpose of Article 23.2.2 WADA Code is indeed the very purpose of the WADA *Code: the* harmonisation throughout the world of a doping code for the use in the fight against doping. This worldwide harmony is crucial to the success of the fight against doping. The WADA Code is intended to be an all-encompassing code that directs affected organisations and athletes. The WADA Code ensures that, in principle, any athlete in any sport will not be exposed to a lesser or greater sanction than any other athlete; rather, they will be sanctioned equally. By requiring consistency in treatment of athletes who are charged with doping infractions or convicted of it – regardless of the athlete's nationality or sport – fairness and proper enforcement are achieved. Any disharmony between different parties undermines the success of the fight against doping. For these good reasons, NOCs and other Signatories agreed to limit their autonomy to act within their own spheres with respect to activities covered by the WADA Code."

[8] Paragraphs 8.24 – 8.26 of the Award. In particular, the Panel states at para 8.24: "…disbarment from the Team for life carries with it the direct consequence of never being able to participate in the Olympics and as a consequence to compete in the Games. That is the underlying reality of ineligibility."

[9] Paras 8.26 and 8.33 of the Award.

[10] *US Olympic Committee v International Olympic Committee* CAS 2011/O/2422 [the USOC Award].

flawed. One cannot dismiss the clear fact that the non-selection of an athlete, relates to and brings forward his inability to participate in the Olympics. A bylaw which prohibits selection for non-sporting reasons and in relation to a previous offence only, for which a penalty has already been served, is indeed disciplinary in nature and gives rise to an additional sanction.

One is, therefore, somewhat mystified by the BOA's insistence on fighting a cause that was lost before it even reached the starting line. It is also difficult to understand why the BOA ignored valid and comprehensive legal advice, which indicated to them that their case had no merits.

Further, it is hard for someone to apply and, indeed, accept, the merits of such an important appeal on arguments and submissions to the effect that the bylaw is necessary, fair and proportionate. These are not issues that come under consideration. On the legal advice given, the BOA should have understood that they undertook a contractual obligation when they ratified and accepted the WADA Code. Such obligation is valid, binding and continuous and the BOA cannot retract from this obligation, at least, not because of arguments that focus on morality and jurisprudence. This Appeal, it is submitted, was not an exercise of "what is wrong with doping" or "the sport needs to be protected." It was an Appeal regarding the legality of a specific regulation, whose application could have potentially affected important legal and sporting rights. Irrespective of whether morality and legality come into the equation, the adherence to the WADA Code, by all stakeholders, is paramount, if certainty and transparency are going to be followed. Any diversion from the Code would seriously undermine both the Code and all attempts to eliminate doping in sport.

Finally, the author cannot but remember that, back in 2008, he raised similar arguments against the IOC, when the latter prohibited his client Katerina Thanou from participating in the Beijing Olympics. Ms Thanou decided in the end not to proceed with legal action against the IOC (although the matter remains open) for reasons that cannot be analysed here. The argument remained, however, that rules which prohibit the eligibility and participation of athletes in the Olympic Games, in the absence of anti-doping offences, are incompatible with the Olympic Charter and the European Convention on Human Rights. As it turned out, Ms Thanou was acquitted in the Greek Court of Appeal of all criminal charges, as well as settling out of court with the IAAF (before CAS in June 2006) on the disciplinary charges (the matter of *IAAF v Kenteris/Thanou & SEGAS*[11]is unreported because of the out-of-court settlement) and there was, therefore, no valid justification for barring Ms Thanou from participating in the Beijing Olympics.

[11] *IAAF v Kenteris/Thanou & SEGAS* CAS 2005/A/887.

CONCLUSION

It follows that the application of such rules violates not only the regulatory framework that the same sporting governing bodies have created, but most importantly, it violates the rights afforded to the athletes. It is not disputed that the intention of sporting governing bodies, by and large, is to protect the image of sport, the health of participants and to ensure that a level playing field is followed continuously. Not many would disagree with these old, but well established justifications towards the application of sanctions for anti-doping infractions.

Such justifications, however, cannot be used by sporting governing bodies as an excuse for diverting from the correct and proportionate application of their rules. Sporting governing bodies have the advantageous position of creating the rules that athletes need to follow. The contractual relationship that is usually present between such governing bodies and athletes depends on the condition that athletes would follow the regulatory framework and accept its terms. In the absence of such acceptance, athletes cannot participate in competition.

Given that the regulatory framework of a governing body is drafted, created and applied in a unilateral way, it is submitted that it is only fair and just if governing bodies adhere to such regulatory framework themselves, without diverting from it. Athletes follow the normative environment the regulator has created and a possible misapplication of the rules or any changes to such environment, without prior notice, could pose a breach to the relationship between governing bodies and athletes. In addition and where there is confusion in the application of the rules, such rules must always be interpreted *contra preferentem* against the party who drafted them.

Finally, it is submitted that breaches of rules and regulations by sporting governing bodies occur all the time. Others occur intentionally, others because of negligence and others because of incompetence. All three categories have been examined repeatedly before several courts and tribunals. The need, therefore, for a practical solution is immense.

The author has been advocating for years (via his PhD research) in favour of the criminalisation of doping in sport. The author is a firm believer that sporting governing bodies cannot properly and efficiently regulate anti-doping in sport. As Robert Voy MD has suggested in the past, allowing governing bodies to regulate testing procedures in sport is like having a fox guarding the hen-house.[12]

When all stakeholders are in a position to understand why doping in sport is wrong (and only for the right reasons) then the only effective, transparent

[12] R Voy *Drugs, Sport & Politics* (Leisure Press, 1991).

and appropriate response would be the application of criminal law on anti-doping infractions. Criminalisation of doping in sport would guarantee the correct and proper application of the sanctions and it would create a fair and proportionate response to the offence committed. It would further create a strong legal foundation which would respect the balance between the rights of the sport and those of the individual athletes.